

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET PALCKO

Plaintiff,

V.

AIRBORNE EXPRESS, INC.

Defendant.

CIVIL ACTION
NO: 02-2990

ORDER

AND NOW, this ____ day of April, 2003, upon consideration of the Motion of Defendant Airborne Express for Protective Order and Stay of Proceedings and the plaintiff's response thereto, it is hereby ORDERED and DECREED that the Motion is GRANTED. It is ORDERED that neither discovery nor disclosure be had in this matter and this action is stayed pending resolution of the defendant's Motion to Compel Arbitration.

BY THE COURT:

Waldman, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET PALCKO

Plaintiff,

V.

AIRBORNE EXPRESS, INC.

Defendant.

CIVIL ACTION
NO: 02-2990

ORDER

AND NOW, this ____ day of April, 2003, upon consideration of the Motions of Defendant Airborne Express to Compel Arbitration and for Protective Order and Stay of Proceedings, and the plaintiff's responses thereto, it is hereby ORDERED and DECREED that the Motions are GRANTED. Plaintiff is ORDERED to arbitrate her claims in accordance with the parties' Mutual Agreement to Arbitrate Claims and this action is stayed pending resolution of the arbitration proceedings.

BY THE COURT:

Waldman, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET PALCKO

Plaintiff,

V.

AIRBORNE EXPRESS, INC.

Defendant.

CIVIL ACTION
NO: 02-2990

**MOTION OF DEFENDANT AIRBORNE EXPRESS
FOR A PROTECTIVE ORDER AND STAY OF PROCEEDINGS**

Defendant Airborne Express respectfully moves the Court pursuant to Rule 26(c) of the Federal Rules of Civil Procedure for a Protective Order directing that disclosure and discovery not be had in this action while the defendant's Motion to Compel Arbitration remains pending, and renews its request, set forth in its pending Motion to Compel Arbitration, that the Court compel plaintiff to arbitrate her claims in accordance with the parties' Mutual Agreement to Arbitrate Claims. Airborne further requests that the Court stay this action and rule on this Motion and the Motion to Compel Arbitration as expeditiously as possible.

The facts and the law in support of this Motion are set

forth in the accompanying Memorandum of Law.

Respectfully submitted,

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Dated: April 1, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET PALCKO

Plaintiff,

V.

AIRBORNE EXPRESS, INC.

Defendant.

CIVIL ACTION
NO: 02-2990

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANT
AIRBORNE EXPRESS FOR A PROTECTIVE ORDER AND STAY**

Defendant Airborne Express ("Airborne") respectfully moves the Court pursuant to Rule 26(c) of the Federal Rules of Civil Procedure for a protective Order directing that disclosure and discovery not be had in this action while the defendant's Motion to Compel Arbitration remains pending. Airborne further renews its pending request that the Court compel plaintiff to arbitrate her claims and dismiss or stay this action pending resolution of the arbitration proceedings.

Procedural Background

Defendant Airborne learned of this lawsuit on September 24, 2002 and filed a Motion to Dismiss on October 2, 2002 based upon insufficiency of service and lack of personal jurisdiction. On October 22, 2002, while the Motion to Dismiss remained pending, Airborne provided plaintiff's counsel with a copy of a

Mutual Agreement to Arbitrate Claims ("the Agreement"), signed by Airborne and by plaintiff in 1998, and asked that plaintiff arbitrate her claims as required under the Agreement. A true and correct copy of the Agreement is attached hereto as Exhibit "A".

Plaintiff declined to voluntarily submit her claims to arbitration, following which Airborne filed its Opposition to plaintiff's Renewed Motion for Default Judgment and its Motion to Compel Arbitration (filed as one document, the Opposition Memorandum and the Motion to Compel Arbitration are separately identified on the Docket Sheet as Docket Entries Nos. 11 and 12). Airborne requested that the Court dismiss plaintiff's Complaint on the additional ground that her claims were subject to arbitration and compel plaintiff to arbitrate. Plaintiff filed her Opposition to the Motion to Compel Arbitration on November 18, 2002. (Docket No. 15)

Plaintiff renewed her motion for a default judgment based upon the purported service of the complaint in June. In its Response to Plaintiff's Motion to Strike Opposition to Plaintiff's Renewed Motion to Enter Default Judgment [hereinafter "Airborne Response"],¹ Airborne requested that the Court stay plaintiff's action on the basis of the Arbitration Agreement. See

¹Airborne requested the Court to also consider the Response, to the extent necessary, as a reply to plaintiff's Opposition to Airborne's Motion to Compel Arbitration.

Response, at 16. (Docket No. 19)

On January 9, 2003, the Court issued an Order denying Airborne's Motion to Dismiss on the basis that service of the plaintiff's complaint "comport[ed] with the requirements of Pennsylvania law." A true and correct copy of the Order is attached hereto as Exhibit "B". (Docket No. 21) The Court also denied plaintiff's Renewed Motion for Default Judgment and Motion to Strike Opposition of Defendant in a separate Order, also issued on January 9, 2003. (Docket No. 20) A true and correct copy of the second Order is attached hereto as Exhibit "C".

Although Airborne's Motion to Compel Arbitration remained pending, Airborne filed its Answer and Affirmative Defenses to the Complaint on January 26, 2003, in the absence of a ruling on the Motion to Compel Arbitration to avoid a claim that it failed to timely respond to the Complaint. Airborne also preserved its request for arbitration by again raising the existence of the Arbitration Agreement as an affirmative defense.

In response to the request of the Court's Deputy, plaintiff and Airborne Express each filed a Case Status Form on February 14 and 17, 2003, respectively. Airborne specified that its submission of the Form was without waiver of its pending Motion to Compel Arbitration. Further, Airborne identified the pending Motion as a Special Issue, stating:

Defendant Airborne Express' Motion to Compel Arbitration, based upon the parties' Mutual

Agreement to Arbitrate Claims, remains pending. In the event it is denied, Airborne anticipates filing an interlocutory appeal. . . .

Airborne Express adopts by reference the plaintiff's summary of the procedural posture of the this case, set forth on the reverse of plaintiff's Case Status Form. Should plaintiff commence discovery, however, Airborne Express will move for a stay, pending resolution of the Motion to Compel Arbitration.

A true and correct copy of Airborne's Case Status Form is attached hereto as Exhibit "D". Plaintiff's recitation of the procedural posture of the case also identified defendant's Motion to Compel Arbitration "as pending".

On February 26, 2003, the Court issued a Scheduling Order, setting deadlines for the completion of discovery and trial readiness. Airborne's counsel wrote to the Court's Deputy on March 6, 2003, raising the issue of the pendency of the Motion to Compel Arbitration. A true and correct copy of the correspondence is attached hereto as Exhibit "E".

Plaintiff served Interrogatories, a Request for Production of Documents and an Initial Disclosure by mail on March 26, 2003, answers and/or objections which will be due on April 28, 2003 absent a stay or a Protective Order. On March 28, 2003, Airborne's counsel conferred with plaintiff's counsel concerning plaintiff's discovery and, as set forth in the confirming correspondence attached hereto as Exhibit "F", plaintiff's counsel will oppose Airborne's request for a

Protective Order and Stay.

ARGUMENT

Airborne respectfully requests, pursuant to Fed.R.Civ.P. 26(c) and the Court's inherent power to control its docket, that the Court issue a Protective Order providing that neither disclosure nor discovery be had until the Court issues a ruling on the Motion to Compel Arbitration. Airborne also renews its pending request that the Court compel plaintiff to arbitrate her claims in accordance with the parties' Mutual Agreement to Arbitrate Claims, and stay all proceedings pending arbitration or dismiss plaintiff's action in its entirety.

**A Stay of Discovery and All Proceedings
Pending Arbitration Is Appropriate Under
the Federal Rules of Civil Procedure, Federal Law and State Law**

Fed.R.Civ.P. 26(c) provides that upon motion and for good cause shown, a court may issue any Order "which justice requires to protect a party . . . from annoyance, . . . oppression or undue burden or expense," including an order that discovery and disclosure not be had. Courts are "empowered to impose a stay of discovery on a showing of good cause." Weisman v. Mediq, Inc., 1995 U.S.Dist. LEXIS 5900, *4 (E.D.Pa. 1995) (Rendell, J.) (discovery stayed pending resolution of motion to dismiss that may narrow or eliminate the need for discovery). Further, trial courts have broad discretion to "stay discovery until preliminary questions that may dispose of the case are

determined." Petrus v. Bowen, 833 F.2d 581, 583 (5th Cir. 1987).

The granting of Airborne's Motion to Compel Arbitration will eliminate the need for discovery under the Federal Rules of Civil Procedure, while the Arbitration Agreement in and of itself establishes good cause for staying discovery. The strong federal and state policies favoring arbitration also constitute good cause for staying discovery where, as here, the request to compel arbitration has been made, the parties signed an unambiguous Mutual Agreement to Arbitrate Claims and the Agreement has been provided to the Court for review. See generally, Spinetti v. Service Corporation International, No. 01-4415 (3d Cir. Mar. 31, 2003) (affirming order severing offending provision of arbitration agreement and compelling arbitration on basis of public policy favoring arbitration and Pennsylvania contract law). Requiring the parties to submit to discovery while the Motion to Compel Arbitration remains pending would unnecessarily subject them to "the very complexities, inconsistencies, and expenses of litigation" that the parties agreed to avoid under the Arbitration Agreement. Suarez-Valdez v. Shearson Lehman/American Express, Inc., 858 F.2d 648, 650 (11th Cir. 1988) (Tjoflat, J. concurring).

The discovery served by plaintiff addresses the substance of plaintiff's claims and the defendant's defenses. This is not a situation, therefore, in which discovery is

necessary to resolve the arbitration issue. As discussed more fully *infra*, the Motion to Compel Arbitration can be decided on the basis of undisputed facts. For purposes of the Motion, Airborne accepts as true the allegations set forth in plaintiff's Opposition to the Motion to Compel and in her supporting Affidavit.

The Protective Order and stay requested by Airborne are also consistent with the requirements of applicable law. The Federal Arbitration Act ("FAA") obligates courts to stay suits involving claims subject to an arbitration agreement:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, *the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*

9 U.S.C.A. § 3 (2003) (emphasis added). If all of the claims are subject to arbitration, the court may dismiss the action instead of staying it. Seus v. John Nuveen & Company, 146 F.3d 175, 179 (3d Cir. 1998).

In her Opposition to Airborne's Motion to Compel Arbitration, plaintiff argues that the FAA does not apply in this case. See Memorandum of Law in Opposition to Motion to Compel, at 2-3. (Docket No. 15) While Airborne disagrees for the

reasons set forth in its Response at 9-12 (Docket No. 19), the result is the same even if the FAA does not apply. In accordance with the parties' Arbitration Agreement, the law of Washington applies to the extent that the FAA does not. See Arbitration Agreement, Exhibit "A" hereto.

Under Washington's Arbitration statute, a Court shall, "upon being satisfied that any issue involved in such action ... is referable to arbitration" stay the action "until an arbitration has been made in accordance with the agreement." Rev. Code Wash. § 7.04.030. Although not necessary to the Court's analysis, Pennsylvania law also provides for a stay pending arbitration. 42 Pa.C.S. § 7304 (2002).

Plaintiff does not dispute that she signed the Arbitration Agreement, but argues, in essence, that she did not read what she signed nor was it explained to her. Affidavit of Margaret Palcko, ¶ 6, Exhibit "A" of Plaintiff's Opposition to Airborne's Motion to Compel Arbitration. (Docket No. 15). As set forth in Airborne's Response, this argument is without merit as a matter of law, whether under the FAA, Washington law or Pennsylvania law. Response at 14-16. See e.g., Seus v. John Nuveen & Company, *supra* at 183-184 (3d Cir. 1998) (under FAA, court need not inquire into matters such as "plaintiff's opportunity for deliberation and negotiation, and whether plaintiff was encouraged to consult counsel"), *cert. denied*, 525

U.S. 1139, 143 L.Ed.2d 38, 119 S.Ct. 1028 (1999); Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 897 (Wn. App. 2001) (under Washington law, "ignorance of the contents of a contract expressed in a written instrument does not ordinarily affect the liability of one who signs it", rejecting the argument that the arbitration agreement was unenforceable because plaintiff signed it as "a matter of office procedure", relatively rapidly and was not given a copy), *review denied*, 145 Wn.2d 1027, *cert. denied*, 154 L.Ed.2d 303, 123 S.Ct. 424 (2002); and Smith v. Creative Resources, Inc., 1998 U.S. Dist. LEXIS 18545, *6 (E.D.Pa. 1998) (under Pennsylvania law, ignorance of the terms of an agreement or a failure to read is no defense to a contractual obligation) (citations omitted).

In sum, good cause for issuing the requested Protective Order arises from the law governing agreements to arbitrate, the terms of the Mutual Agreement to Arbitrate Claims, judicial economy and efficiency, and Airborne's reasonable expectations and reliance upon the Agreement. Plaintiff is not harmed by a Protective Order since she contractually obligated herself to arbitrate and she can pursue her claims and remedies in arbitration. Further, plaintiff's service of discovery is yet a further breach of her obligations under the Arbitration Agreement. Subjecting Airborne to arbitration would place an undue burden and expense on it, depriving Airborne of the benefit

of its bargain.

Airborne respectfully requests that the Court issue a Protective Order that disclosure and discovery not be had pending resolution of the Motion to Compel Arbitration. Airborne further requests that the Order be issued as expeditiously as possible to avoid the passage of discovery and trial deadlines.

Standard for Deciding Motion to Stay

Under the FAA, the appropriate standard for review of a motion to compel arbitration and/or a request to stay is the standard used to review a motion for summary judgment. E-Time System, Inc. v. VoiceStream Wireless Corporation, 2002 U.S. Dist. LEXIS 15568, *16 (E.D.Pa. 2002) (Yohn, J.) (citations omitted). The court must determine whether there is a genuine factual issue as to the applicability of the arbitration agreement to plaintiff's claims. Id. When the applicability of the Arbitration Agreement is clear, the "defendant will be entitled to the stay it seeks." Id.

Similarly, under the Washington Arbitration Act, if a trial court is satisfied after hearing from the parties "that no substantial issue exists as to the existence or validity of the agreement to arbitrate or the failure to comply therewith" it shall direct the parties to arbitration in accordance with the agreement. Wash. Rev. Code § 7.04.040(1). The court shall stay the proceeding until arbitration has been had on the motion of

any party to the agreement. Wash. Rev. Code § 7.04.030. Accord, 42 Pa.C.S. § 7304 (court to proceed "summarily" to determine arbitration issue).

Assuming the truth of the plaintiff's statements in her affidavit for purposes of this motion, there is no genuine issue of material fact concerning arbitration. The parties both signed the Agreement and it establishes that plaintiff's claims are arbitrable. See e.g., Arbitration Agreement, "Claims Covered by this Agreement", Exhibit "A". Airborne requested that plaintiff voluntarily arbitrate her claims and she refused. Finally, plaintiff's allegations concerning the circumstances of her execution of the Arbitration Agreement are irrelevant as a matter of law.

CONCLUSION

Airborne requests that the Court enter an Order directing that discovery and disclosure not be had pending the resolution of the pending Motion to Compel Arbitration and renews its request, set forth in its Motion to Compel Arbitration, that the Court dismiss this action or stay it pending arbitration of the plaintiff's claims in accordance with the Mutual Agreement to Arbitrate Claims.

Respectfully submitted,

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Attorney for defendant
Airborne Express

Dated: April 1, 2003

Certification

I, Sharon M. Erwin, certify pursuant to Fed.R.Civ.P. 26(c) that I conferred in good faith with plaintiff's counsel, David L. DaCosta, on March 28, 2003 in an effort to resolve the dispute raised by this motion, but was unsuccessful.

Sharon M. Erwin

Dated: April 1, 2003

CERTIFICATE OF SERVICE

I, Sharon M. Erwin, certify that I am causing a true and correct copy of the foregoing Motion of Defendant Airborne Express for Protective Order and Stay of Discovery to be served by hand delivery this 1st day of April, 2003 upon the following:

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Sharon M. Erwin

Dated: April 1, 2003